

*In the Matter of Thomas Sposato, South Woods State Prison*  
DOP Docket No. 2004-471  
**(Merit System Board, decided July 14, 2004)**

Thomas Sposato seeks a lump sum payment for asserted out-of-title work performed in an acting capacity between June 2, 2001 and May 2, 2003.

The record in this case evidences that the appellant filed a grievance requesting compensation for the time he asserted that he served as an Assistant Director, Facilities Management. Mr. Sposato stated that he was appointed to the position on June 2, 2001 and served through May 2, 2003 without receiving any monetary compensation. He claimed that the previous administration approved his position reclassification, but that the current administration disapproved the reclassification. During the Departmental level grievance proceeding, the appointing authority presented that there was a need for the upgraded position of Assistant Director, Facilities Management at South Woods State Prison, and the reclassification request was denied at a higher level. The Hearing Officer determined that Mr. Sposato was never officially placed in the Assistant Director, Facilities Management title and that his official title had been Engineer in Charge of Maintenance 1 since July 6, 1996. Additionally, he found that the Institutional Request for Personnel Action (the form utilized to request Mr. Sposato's upward reclassification) was not approved beyond the institutional level, the Salary Adjustment Request DPF-77 was not approved by the Department of Personnel (DOP) or the Office of Management and Budget (OMB), and that the DPF-77 must be approved prior to effecting the appellant's promotion. Thus, Mr. Sposato's grievance was denied.

On appeal, Mr. Sposato states that his prior title of Engineer in Charge of Maintenance 1 was reclassified by the DOP to the Assistant Director, Facilities Management title effective June 2, 2001 based on the findings of a Position Classification Questionnaire (PCQ). He states that the proper Institutional Request For Personnel Action forms were signed and submitted to the Human Resources Unit of the Department of Corrections (DOC), which were ultimately forwarded to the DOP for final approval. However, no action was taken due to the change in administration and he was subsequently informed that all personnel requests were being returned to the requesting Departments for the new administration's review and approval. He states that during this time period he continued to perform all of the duties of an Assistant Director, Facilities Management under the direction of his Administrator.

Moreover, Mr. Sposato points out that Mr. Ed Watts, Assistant Engineer in Charge of Maintenance 1, was provisionally promoted to Engineer in Charge of Maintenance 1 on November 3, 2001 and was receiving compensation and assumed all the duties of that title. The appellant also notes that the promotional examination for Assistant Director, Facilities Management (PS3109I) was announced with a closing date of December 21, 2001 and that he passed that examination and ranked #1 on the employment roster. Thus, Mr. Sposato states that the DOC decision asserting that he was still functioning in the title Engineer in Charge of Maintenance 1 is false because if that

were the case, why would Mr. Watts have been provisionally appointed to that title. He states that on May 2, 2003, the DOC returned himself and Mr. Watts to their previous titles.

Mr. Sposato submitted documentation with his appeal that included, in pertinent part, a Position Action Request, noting that South Woods State Prison requested Mr. Sposato's title of Engineer in Charge of Maintenance 1 be reclassified to Assistant Director, Facilities Management and the DOP's approval of this request with an effective date of June 2, 2001; a completed PCQ; a Salary Adjustment Request from Engineer in Charge of Maintenance 1 to Assistant Director, Facilities Management, with a requested effective date of June 2, 2001; an Institutional Request for Personnel Action noting the promotion with Administrator/Superintendent approval; a Personnel Action Memorandum from the Manager, Human Resources, South Woods State Prison, dated September 26, 2001, informing Mr. Sposato that he was provisionally appointed to the title under appeal effective June 2, 2001, and a letter from Administrator W. Stanley Nunn, South Woods State Prison, dated October 12, 2001, congratulating Mr. Sposato on his promotion to the subject title. Additional information included internal correspondence of the DOC discussing utilization of the title under appeal, information regarding the appointment of Mr. Ed Watts to the Engineer in Charge of Maintenance 1 title, and Mr. Sposato's promotional application, the employment roster, and promotional announcement for the title under appeal.

In response to a request to submit additional information, Mr. Sposato provided copies of his PAR evaluations for 2002 and 2003, noting his title as Assistant Director, Facilities Management. Additionally, he provided copies of PARs he completed for several subordinates, including the Supervisor, Regional Food Service, the Supervising Institutional Trade Instructor (Warehousing), and the Engineer in Charge of Maintenance 1. Further, Mr. Sposato supplemented the record noting that on March 8, 2004, representatives from the DOC, Human Resources, Classification Unit interviewed him for a desk audit. He states that he was under the impression that the audit was done to verify his job duties over the past three years, but that the individuals performing the audit were only interested in his current job duties, who he supervises, and the PARs he prepared and administered as of March 8, 2004. Mr. Sposato also noted that he was officially returned to his previously held title in May 2003, but that he voluntarily continued to perform the duties under appeal, hoping that the Chief of Staff would reconsider utilization of this important and justified position. Additionally, he states that Kathryn MacFarland, Administrator, informed him on February 23, 2004 that the areas of his responsibility and supervision for the past three years were being transferred to the Associate Administrator on March 1, 2004 and that his current duties as Engineer in Charge of Maintenance 1 have nothing to do with the work he was performing as the Assistant Director, Facilities Management.

A review of Mr. Sposato's personnel record demonstrates that he was appointed to the Engineer in Charge of Maintenance title in July 1996, but does not reflect an appointment, provisional or otherwise, to the Assistant Director, Facilities Management title. A review of Mr. Watts' personnel record demonstrates that he was provisionally

appointed to the Engineer in Charge of Maintenance 1 title in November 2001 and he was returned to his permanent title of Assistant Engineer in Charge of Maintenance 1 on May 3, 2003.

It is noted that the DOC was provided the opportunity to supplement the record on October 20, 2003 and December 15, 2003, but did not provide any documentation concerning this matter.

## CONCLUSION

The established and controlling regulatory procedure governing out-of-title work and other classification disputes is *N.J.A.C.* 4A:3-3.9. Specifically, *N.J.A.C.* 4A:3-3.9(f) states that the effective date of a position reclassification shall be the pay period immediately after 14 days from the date the DOP received the appeal or reclassification request, or at such earlier date as directed by the Commissioner. Further, the Board has previously determined that a remedy in an out-of-title work circumstance would not mandate some form of differential back pay. See *In the Matter of Arlene Green-Zirpolo* (MSB, decided December 7, 1993). Rather, based on a finding of out-of-title work, the appointing authority is not precluded from removing identifiable out-of-title duties from a position to effect a correct position classification.

However, in the matter at hand, the record demonstrates that based on submissions contained in the informal PCQ, the DOP approved the reclassification of Mr. Sposato's position as an Engineer in Charge of Maintenance 1 to the title of Assistant Director, Facilities Management on September 21, 2001 with an effective date of June 2, 2001. Although Mr. Sposato presented such documentation as a Personnel Action Memorandum from South Woods State Prison indicating that he was provisionally appointed pending promotional procedures to the subject title on June 2, 2001, a letter of congratulations from the Administrator of the prison, an Institutional Personnel Action Request, and a Salary Adjustment Request, a review of his electronic (PMIS) personnel record does not reflect that an appointment was ever recorded for him to the Assistant Director, Facilities Management title.

As Mr. Sposato and the Hearing Officer noted, the Salary Adjustment Request submitted in support of his promotion was returned to the Department of Corrections for the incoming administration to review and approve, as were all requests during the transition of government. As part of his submissions, the appellant provided an e-mail from Judi Lang, Department of Corrections, to Dorothy Jones, former Manager, Human Resources, South Woods State Prison, date stamped July 23, 2002 that indicated "Thomas Sposato's DPF-77 (Salary Adjustment Request) is being returned with no action taken as directed by Chief of Staff Ellis." In this regard, the Board notes that a request for a lump sum payment, in the form of a salary adjustment request, may be utilized to address acting service in a higher title. However, such requests must be approved by the agency head and are subject to Salary Adjustment Committee approval. In the present matter, the salary adjustment request for Mr. Sposato's promotion to the

Assistant Director, Facilities Management title, dated October 9, 2001, requesting an effective date of June 2, 2001, was returned with no action taken in July 2002 and the DOP lacks the statutory authority to review the exercise of an appointing authority's discretionary authority in this matter. *See In the Matter of Anthony Bruno, et al.* (Commissioner of Personnel, decided August 3, 2000). Nevertheless, the record indicates that information provided to Mr. Sposato at the South Woods State Prison institutional level led him to believe that he was provisionally appointed to the subject title effective June 2, 2001, consistent with the DOP's informal findings during its administrative audit of the position. Appellant indicated that he remained in the position until May 3, 2003, that he voluntarily continued to perform the duties to assist the Administrator hoping that the Chief of Staff would change his mind, and that his areas of responsibility were ultimately transferred to the Associate Administrator effective March 1, 2004.

With respect to the appellant's argument that he voluntarily continued to perform the duties after May 2, 2003, the Board emphasizes that Merit System law and rules do not countenance assignment of out-of-title work. *N.J.A.C. 4A:4-2.6(c)* generally precludes use of out-of-title work experience to satisfy experience requirements for promotional examinations. Out-of-title work also undermines the State classification plan and creates salary inequities. There is a readily available process for State employees to present out-of-title work concerns and it is clearly not appropriate for State agencies and/or employees to work out-of-title and then seek compensation for such improper work. *See In the Matter of John Tomasiello, et al.* (Commissioner of Personnel, decided August 24, 1990).

In the matter at hand, the appellant would be justified in performing the duties of an Assistant Director, Facilities Management from June 2, 2001 to July 23, 2002, the date the DPF-77 was returned to the South Woods State Prison Human Resources Office with no action taken by the agency head, by virtue of the findings of the DOP in the Position Action Request and the PCQ. Moreover, he would be justified in performing such duties after July 23, 2002 and until May 3, 2003, since the record does not demonstrate if or when Mr. Sposato received official notification that the DPF-77 was returned with no action. However, it is evident that any work he performed on or after May 3, 2003 would not be compensable because the appellant asserts that he was returned to his former title at that time. As indicated earlier, Mr. Sposato's PMIS record does not reflect an appointment to the subject title, and, other than his argument that Mr. Watts was returned to the Assistant Engineer in Charge of Maintenance 1 title on May 3, 2003, no official record exists as to when his duties in an acting capacity were officially changed back to those consistent with his permanent title.<sup>1</sup> As indicated earlier, a remedy in an out-of-title work circumstance would not mandate some form of differential back pay and that the appointing authority is not precluded from removing identifiable out-of-title duties for a position to effect a correct position classification. As such, since Mr. Sposato concedes

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<sup>1</sup> The promotional examination for Assistant Director, Facilities Management resulted in an employment roster of one eligible, Mr. Sposato. The subject list was issued with an effective date of July 17, 2002 and an expiration date of July 16, 2005. The DPF-77 was returned with no action taken by the agency head on or about July 23, 2002.

that he was returned back to his permanent title on May 3, 2003, the voluntary out-of-title work he performed after that date would not mandate differential back pay.

Nevertheless, this record demonstrates that Mr. Sposato served in an acting capacity in the Assistant Director, Facilities Management title from June 2, 2001 through the date the DPF-77 was returned to South Woods State Prison with no action taken, up to May 3, 2003. The appointing authority does not dispute that Mr. Sposato performed these duties, and, as indicated earlier, Mr. Watts' personnel record demonstrates that he was returned to the Assistant Engineer in Charge of Maintenance 1 title on May 3, 2003. As such, consistent with the provisions of *N.J.A.C. 4A:3-3.9(f)* and based on equitable grounds, Mr. Sposato's record should reflect a provisional appointment to the Assistant Director, Facilities Management title on June 2, 2001 and a return to his permanent title on May 3, 2003. Mr. Sposato should receive differential pay for this time frame only.

## **ORDER**

Therefore, it is ordered that this appeal be granted.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.